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8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 MICHAEL E. JACQUES,
12 Plaintiff,

13 v.

14 D. TILLERY,
15 Defendant.
16

No. 2:23-cv-0079 TLN KJN P

ORDER AND FINDINGS AND
RECOMMENDATIONS

17 Plaintiff is a state prisoner, proceeding pro se and in forma pauperis. On June 29, 2023,
18 plaintiff was issued an order to show cause. Plaintiff did not respond, and on August 1, 2023, the
19 undersigned recommended that this action be dismissed. On August 2, 2023, plaintiff filed a
20 document styled, "Objections to Magistrate Judges' Findings and Recommendations/Response to
21 Judge's Order to Show Cause" (ECF No. 16.) As discussed below, the findings and
22 recommendations are vacated, and it is recommended that this action be dismissed.

23 Belated Response to Order to Show Cause

24 Plaintiff's timely objections contain plaintiff's belated response to the order to show
25 cause. Plaintiff was deprived of access to legal materials which prevented plaintiff from timely
26 responding to the order to show cause. Good cause appearing, the court vacates the findings and
27 recommendations, and deems plaintiff's response to the order to show cause timely filed.

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1 Plaintiff's Complaint

2 In the January 13, 2023 complaint, plaintiff raises one retaliation claim against defendant
3 D. Tillery, Correctional Officer at Mule Creek State Prison ("MCSP"). Plaintiff transferred from
4 High Desert State Prison ("HDSP") to MCSP with ten boxes of plaintiff's property. Upon arrival
5 at MCSP on July 20, 2021, HDSP staff identified to Tillery the contents of the boxes, including
6 that 6 out of the 10 boxes contained active legal property. Tillery then went to his computer and
7 subsequently informed plaintiff that Tillery knows who plaintiff is and that plaintiff sues CDCR
8 staff. Tillery then tossed plaintiff's property back on the van, knowingly depriving plaintiff of the
9 legal materials needed for plaintiff's upcoming deadlines. (ECF No. 1 at 11.)

10 Defendant Tillery's Death

11 On February 28, 2023, the U.S. Marshal filed a notice of intent not to waive service on
12 Donny Tillery because Tillery is deceased. (ECF No. 10.) Public records on the CDCR website
13 confirm that on November 3, 2022, Donny Tillery retired as a correctional officer at MCSP and
14 died on November 20, 2022. [https://www.cdcr.ca.gov/insidecdcr/2022/11/29/donny-tillery-](https://www.cdcr.ca.gov/insidecdcr/2022/11/29/donny-tillery-retired-officer-passes-away/)
15 [retired-officer-passes-away/](https://www.cdcr.ca.gov/insidecdcr/2022/11/29/donny-tillery-retired-officer-passes-away/) (accessed June 21, 2023).¹ The November 20, 2022 death of Donald
16 "Donny" Tillery was also noted on the public website "legacy.com."
17 <https://www.legacy.com/us/obituaries/name/donald-tillery-obituary?id=38206285> (accessed June
18 21, 2023). Plaintiff does not dispute that Tillery died prior to the filing of this action. (ECF No.
19 16.)

20 Rule 25

21 Rule 25 of the Federal Rules of Civil Procedure governs the substitution of parties.

22 If a party dies and the claim is not extinguished, the court may order
23 substitution of the proper party. A motion for substitution may be
made by any party or by the decedent's successor or representative.

24 ¹ The court may take judicial notice of facts that are "not subject to reasonable dispute
25 because it . . . can be accurately and readily determined from sources whose accuracy cannot
26 reasonably be questioned," Fed. R. Evid. 201(b), including undisputed information posted on
official websites. Daniels-Hall v. National Education Association, 629 F.3d 992, 999 (9th Cir.
2010). See also In re Yahoo Mail Litig., 7 F.Supp.3d 1016, 1024 (N.D. Cal. 2014) (court may
27 take judicial notice of information on "publicly accessible websites" not subject to reasonable
dispute); Louis v. McCormick & Schmick Restaurant Corp., 460 F.Supp.2d 1153, 1155 n.4 (C.D.
28 Cal. 2006) (court may take judicial notice of state agency records).

1 If the motion is not made within 90 days after service of a statement
 2 noting the death, the action by or against the decedent must be
 dismissed.

3 Fed. R. Civ. P. 25(a)(1). Such provision authorizes the substitution of a proper party when an
 4 existing party dies after the suit is commenced. Id.; see also History and Application of Rule, 7C
 5 Fed. Prac. & Proc. Civ. § 1951 (3d ed.) (“The rule presupposes that substitution is for someone
 6 who was a party to a pending action.[] Substitution is not possible if one who was named as a
 7 party in fact died before the commencement of the action.[]” (footnotes omitted)).

8 In 2020, the Ninth Circuit held that a dead person may not sue, be sued, or be joined as a
 9 party to a lawsuit. LN Mgmt., LLC v. JPMorgan Chase Bank, N.A., 957 F.3d 943, 951 (9th Cir.
 10 2020). The Ninth Circuit declined to decide whether Rule 25(a) permits the substitution of a
 11 party “dead *ab initio*,” but did discuss cases from the Fourth, Fifth and Tenth Circuits addressing
 12 such issue in several contexts. LN Mgmt., LLC, 957 F.3d at 955-56. Of relevance here, the Fifth
 13 Circuit held that because defendant Buras died after he had hit and killed the victim with his
 14 truck, but before the relatives of the victim filed the lawsuit, Rule 25(a) was unavailable because
 15 Buras “predeceased the filing of the action.” Mizukami v. Buras, 419 F.2d 1319, 1320 (5th Cir.
 16 1969). Several district courts in California agree, holding “that Rule 25 substitutions are
 17 unavailable when the defendant for whom substitution is sought was dead before the
 18 commencement of the action, which was therefore a nullity.” LN Mgmt., LLC, 957 F.3d at 954
 19 (collecting cases); see also Givens v. California Department of Corrections and Rehabilitation,
 20 2021 WL 1966086 at *3 (E.D. Calif., May 17, 2021) (where a putative defendant dies before a
 21 lawsuit is filed, the claims against him are a “nullity” and must be “dismissed with prejudice”),
 22 findings and recommendations adopted, 2022 WL 2954738 (E.D. Cal. July 26, 2022).²

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25 ² District courts outside California also agree, citing Givens. Lott v. Corizon, 2022 WL 1423606
 26 (W.D. Mich. Mar. 31, 2022) (same), report and recommendation adopted, 2022 WL 1422331
 27 (W.D. Mich. May 5, 2022), motion for relief from judgment denied, 2022 WL 18586847 (W.D.
 Mich. Dec. 29, 2022); Porter v. Washington, 2022 WL 2037942, at *6 (W.D. Mich. June 7, 2022)
 28 (same); Shaffer v. Unknown Parties #1, 2022 WL 17839908, at *2 (W.D. Mich. Oct. 11, 2022)
 (same), report and recommendation adopted, 2022 WL 17830553 (W.D. Mich. Dec. 21, 2022).

1 Discussion

2 The undersigned is persuaded that Rule 25 does not apply to this action, and that
3 plaintiff's complaint against decedent Tillery is a nullity. Lacy v. Tyson, 2012 WL 4343837, *2
4 (E.D. Cal. Sept. 20, 2012), adopted, 2012 WL 5421230 (E.D. Cal. Nov. 5, 2012). In Lacy, the
5 plaintiff was a pro se state prisoner raising a § 1983 complaint against correctional officers and
6 medical staff. The district court held that because decedent R. Reyna died before the lawsuit was
7 filed, the motion for substitution under Rule 25 was denied, and decedent Reyna was dismissed
8 with prejudice. Lacy, 2012 WL 4343837 at *2. "While the Ninth Circuit has not addressed this
9 issue, courts have held, as a rule, that the substitution of parties cannot be ordered in conformance
10 with Rule 25(a)(1) where the person for whom substitution is sought died prior to being named a
11 party." Lacy, 2012 WL 4343837 at *2.

12 Here, it is undisputed that Donald Tillery died before the instant action was filed. Thus,
13 there is no procedure in place for the court to substitute Tillery's presence in this action for that of
14 a personal representative of Tillery's estate. See Moul v. Pace, 261 F. Supp. 616, 617-18 (D. Md.
15 1966) ("no procedural mechanism exists for the Court to substitute [decedent's] presence in this
16 case for that of a personal representative of his estate."); Chorney v. Callahan, 135 F.Supp. 35, 36
17 (D. Mass. 1955) (where a suit is filed against an individual who died before the complaint was
18 filed, "at that point the purported action was a nullity, for a dead man obviously cannot be named
19 party defendant in an action.")

20 Plaintiff Jacques previously cited civil rights action, Jacques v. Fererkins, No. 2:21-cv-
21 0141 KJM KJN P (E.D. Cal.), where plaintiff was appointed counsel to assist in pursuing a
22 motion to substitute the deceased defendant's parents as parties to the litigation. (ECF No. 12 at
23 2.) However, in plaintiff's prior case, the deceased defendant died while the action was pending,
24 after plaintiff filed the complaint. "The purpose behind Rule 25(a) suggests that substitution
25 remains available after filing and prior to service." Gilmore v. Lockard, 936 F.3d 857, 864 (9th
26 Cir. 2019) (emphasis added).

27 Here, defendant Tillery died on November 20, 2022, before plaintiff filed the instant
28 lawsuit on January 13, 2023. Indeed, the Ninth Circuit later confirmed such distinction:

1 In overturning the denial of Gilmore’s motion to substitute the prison
2 guard’s “successor or representative,” Fed. R. Civ. P. 25(a), we noted
3 in passing that Mizukami was “inapposite since that suit was filed
after the defendant’s death, and Rule 25(a) presupposes that the
deceased was already a party in the action prior to death.”

4 LN Mgmt., LLC, 957 F.3d at 951, quoting Gilmore, 936 F.3d at 864 n.4. Thus, the Ninth Circuit
5 concluded that a party cannot bring a federal lawsuit against a dead person. LN Mgmt., LLC, 957
6 F.3d at 955.

7 Following LN Mgmt., LLC, plaintiff is not allowed to name or join a dead person as a
8 defendant. This case is very similar to Lacy, and the undersigned is persuaded by, and adopts, its
9 reasoning. See also Cavanaugh v. County of San Diego, 2020 WL 8838234 (S.D. Cal. Aug. 24,
10 2020) (“This Court is persuaded to follow the several federal courts which hold that a party
11 cannot maintain suit against a dead person, or in any other way make a dead person (in that
12 person’s own right, and not through a properly represented estate or successor) a party to a federal
13 lawsuit.”) Because Donald Tillery died before this action was commenced, Rule 25(a) does not
14 apply, plaintiff’s claims against such defendant are a nullity, and defendant Donald Tillery should
15 be dismissed from this action with prejudice.

16 In the objections, plaintiff renewed the request for the appointment of counsel, arguing
17 that counsel would be able to determine if plaintiff could proceed and if plaintiff could proceed
18 under Estate of Holdaway, 40 Cal.App.5th 1049, 253 Cal. Rptr. 3d 659 (2019).³ (ECF No. 16 at
19 3). However, Holdaway is inapposite. In Holdaway, the court addressed whether the trial court’s
20 dismissal of a creditor’s petition in a probate action terminated the tolling of the statute of
21 limitations governing the creditor’s claim. Id. The state court did not address whether a plaintiff
22 could name a deceased defendant in a civil action. Id. Under the circumstances presented here,
23 it would be futile to appoint counsel to assist plaintiff in preparing a motion for substitution
24 because a substitution under Rule 25(a) is not available. Thus, plaintiff’s renewed request to
25 appoint counsel is denied.

26 _____
27 ³ Plaintiff cited 40 Cal.App.5th 1059 (2019), which is the second page of Supershuttle
28 International, Inc. v. Labor & Workforce Development Agency, 40 Cal.App.5th 1058 (Oct. 7,
2019). It appears plaintiff’s citation was a typographical error in that Holdaway is located at page
1049.

1 Finally, plaintiff named no other individual as a defendant in this action. The allegations
2 in this case are based solely on the actions and omissions of defendant Tillery. Therefore, the
3 action should be dismissed.

4 Request for Reimbursement of Filing Fee

5 Plaintiff claims that the CDCR knew at the time plaintiff filed a grievance concerning
6 Tillery's actions that Tillery had not only retired, but had died, and argues that if such information
7 had been relayed to plaintiff, plaintiff would not have litigated this case. Plaintiff was unable to
8 access the CDCR website to find out that Tillery had died prior to the filing of this action.
9 Plaintiff asks the court to order the CDCR to reimburse plaintiff for the \$350.00 filing fee.

10 Plaintiff provides no legal authority for this request. While the CDCR may have been
11 aware of Tillery's death, it is unclear that prison staff reviewing plaintiff's grievances were aware
12 of Tillery's death. In addition, prison staff reviewing grievances are tasked with reviewing and
13 investigating the allegations raised in the grievance. The court is unaware of any regulation
14 requiring appeals officers to investigate or report the status of corrections staff named in such
15 grievance. Plaintiff's request for reimbursement is denied.

16 Status of Payments

17 Finally, plaintiff "lacks funds" in plaintiff's trust account because SVSP told plaintiff that
18 the Eastern District failed to inform SVSP that plaintiff has paid all of plaintiff's cases. (ECF No.
19 16 at 16.) Plaintiff failed to provide any other case numbers for cases filed in this court.

20 On June 22, 2023, plaintiff was informed that the filing fee for this case was paid in full,
21 and the CDCR was notified to stop withdrawals. (ECF No. 13.) Plaintiff may present a copy of
22 this order to inmate trust account officials at SVSP to demonstrate the full payment of filing fees
23 in this action. As to plaintiff's other unidentified cases, this court is unable to determine whether
24 plaintiff has paid all filing fees in other unidentified cases.

25 Accordingly, IT IS HEREBY ORDERED that:

- 26 1. Plaintiff's belated response to the order to show cause (ECF No. 16) is deemed timely
27 filed;
28 2. The findings and recommendations (ECF No. 15) are vacated;

3. Plaintiff's renewed request to appoint counsel (ECF No. 16 at 3) is denied;

4. Plaintiff's request for the reimbursement of the court's filing fee (ECF No. 16) is denied; and

5. Plaintiff paid in full the court's filing fee for Case No. 2:23-cv-0079 TLN KJN (E.D. Cal.), and no further withdrawals should be made in connection therewith. (ECF No. 13.)


Further, IT IS RECOMMENDED that:

1. Defendant D. Tillery should be dismissed from this action with prejudice; and

2. This action should be dismissed.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any response to the objections shall be filed and served within fourteen days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: August 14, 2023


KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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